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client name: client matter number: 70073.00009

date: July 1, 2009 pages (with cover):

comments: **Please find attached Magma Power Company's comments on the Draft CAO for Central Mine et al.**

If you do not receive all pages, please call immediately Facsimile Center: (415) 856-7405

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VIA E-MAIL AND FACSIMILE (916) 464-4645

Victor J. Izzo
Senior Engineering Geologist
California Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive #200
Rancho Cordova, CA 95670-6114

Re: Draft Cleanup and Abatement Order for Central, Cherry Hill, Empire, Manzanita, and West End Mines, Colusa County

Dear Mr. Izzo:

The following comments on the draft Cleanup and Abatement Order for the Central, Cherry Hill, Empire, Manzanita, and West End Mines in Colusa County ("Draft Order") prepared by the Central Valley Regional Water Quality Control Board ("Regional Board") are submitted on behalf of Magma Power Company ("Magma"). For the reasons explained below, the Regional Board's inclusion of Magma as a discharger in the Draft Order is inappropriate and based on incorrect factual statements. Magma requests that the Regional Board remove it as a discharger from the Draft Order and any subsequent version of the order.

I. Background

Magma is a geothermal power company that explores for and develops geothermal resources used to generate electric power. Geothermal power is extracted from heat stored in the earth and is a renewable and environmentally-friendly source of energy. Magma helped lead creation of the U.S. geothermal industry. Magma first drilled for naturally produced steam in the mid-1950s.

In the mid-1960s, Magma leased two parcels of land in Colusa County. The Sulphur Creek Mining District of Colusa County ("District") has long been recognized as an area of hydrothermal alteration. It is particularly known for mercury and gold mineralization. According to the Draft Order, mercury and gold mining activities in the District began in the late 1800s. The Central, Cherry Hill, Empire, Manzanita, and West End Mines are inactive mercury and/or gold mines that are located in the Wilber Springs hydrothermal area of the District. Magma had no involvement in mining activities in the District.

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Between 1965 and 1968, Magma was involved in drilling two exploratory geothermal wells used to evaluate potential geothermal energy development in the Wilber Springs hydrothermal area of the District. Both geothermal wells were closed in 1968 pursuant to State standards, and Magma had no further involvement in geothermal energy development in the District.

II. Magma's Historical Property Interest and Limited Geothermal Operations in the District

A. Property Interest

We understand the Regional Board identified Magma as a potential discharger based on the company's historical leasehold interests in Colusa County. Magma entered into two leases in Colusa County. On May 27, 1964, Magma entered into a lease for approximately 200 acres in Colusa County with New Elgin Mine Corporation as lessor. On June 3, 1965, Magma entered into a lease for approximately 171 acres in the District with Bailey Minerals and J.W. Weightman as lessor. Magma subsequently assigned a 50% interest in the two leases to Geothermal Resources International, Inc. ("GRI").

In March 1968, Magma and GRI assigned and conveyed their lease rights from both leases to D.D. Feldman and Cordero Mining. This effectively marked the end of Magma and GRI's involvement in any geothermal energy development in the area. The leases were subsequently assigned from D.D. Feldman and Cordero Mining to Geothermal Electric Corp., which in turned assigned the leases back to the original owners (New Elgin Mine Corporation, Bailey Minerals, and J.W. Weightman) in January 1971.

B. Limited Geothermal Operations

As indicated above, Magma had limited involvement in exploration of geothermal energy development in the District and had no involvement in mining operations in the District, nor did Magma have any involvement in mercury prospecting or exploration for mercury deposits. Magma's only activity within the District occurred between 1965 and 1968, when Magma was involved in drilling two exploratory geothermal wells on the north side of Sulphur Creek. Neither well resulted in geothermal energy development.

The first well, known as Magma Power "Wilbur-1" or W-1, was drilled and operated by Magma and completed on December 14, 1965. The well was spud on September 22, 1965 and drilled to a depth of 1,226 feet. Only a few scattered bottom-hole-temperature readings were collected during the drilling of the well. W-1 was closed and abandoned on June 19, 1968. The abandonment was done under the approval of the Division of Oil, Gas & Geothermal Resources ("DOGGR") (then known as the Division of Oil and Gas) and accepted by the agency.

The second well, known as Cordero Mining "Wilber Hot Springs-1" or WHS-1, was drilled and operated by Cordero Mining. The well was spud on June 10, 1968 and drilled

to a depth of 3,757 feet. WHS-1 encountered water entries at 675 feet with significant water entry encountered at 3,732 feet. The well was re-drilled to make it more vertical and a similar water entry was encountered at approximately 3,017 feet. The well subsequently was re-drilled to a depth of 3,713 feet, completed, and closed and abandoned on August 7, 1968. The abandonment was done under the approval of the DOGGR and accepted by the agency. WHS-1 was the responsibility of Cordero Mining, not Magma.

C. Factually Incorrect Statements in the Draft Order

The Draft Order contains several factually incorrect statements about Magma, including a statement in paragraphs 3 that the named dischargers "either own, have owned, or have operated the mining sites" and a similar statement in paragraph 5. These statements are incorrect with respect to Magma, which never has owned mining sites or other land in the District and has had no involvement in mining operations in the District or operating mining sites in the District.[1] In addition, Attachment B to the Draft Order states that Magma had a leasehold interest in one or more parcels from 1965 to 1986. This statement also is incorrect; Magma has had no real property interest in the District since 1968.

III. Magma Cannot Be Considered A "Discharger"

The Regional Board's authority to issue a Cleanup and Abatement Order to Magma is based on Water Code section 13304, which authorizes the issuance an order to "[a]ny person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into waters of the state and creates, or threatens to create, a condition of pollution or nuisance . . ." Water Code § 13304(a).

The concept of "discharging" waste is central to section 13304. In Lake Madrone Water District v. State Water Resources Control Board (1989) 209 Cal.App.3d 163, the court defined the term "discharge" according to its ordinary meaning to mean" 'to relieve of a charge, load or burden; . . . to give outlet to: pour forth: EMIT.' " Id. at 174 (quoting Webster's New Int'l Dictionary 644 (3d ed. 1961)). Accordingly, the State Water Resources Control Board ("State Board") has held that cleanup liability may extend, depending on the facts of the case, to parties for which there is reasonable evidence of responsibility. See In re U.S. Cellulose, Order No. WQ 92-04 (March 19, 1992), 1992 Cal. ENV LEXIS 2, *4. However, "[t]here must be substantial evidence to support a finding of responsibility for each party named." Id.

The Regional Board has identified no documentation or other evidence that demonstrates that Magma "discharged" waste into the waters of the State as the term has been defined

[1] Furthermore, Regional Board staff have indicated they are unable to associate Magma with any one of the five mines that are the subject of the Draft Order.

Paul Hastings

for purposes of Water Code section 13304, and Magma is not aware of any such evidence. As discussed above, Magma had no involvement in mining operations in the District or operating mining sites in the District, and its limited geothermal well drilling activity did not result in any discharge of waste into Sulphur Creek or other waters of the State.[2] The two geothermal wells in which Magma was involved were regulated by the DOGGR and drilled in accordance with applicable standards of the agency.

The mere fact that Magma leased land in the District does not alone subject it to cleanup liability. In In re U.S. Cellulose, the State Board affirmed the Regional Board's removal of a lessee from an order. The State Board rejected arguments that the lessee should be named as a discharger because it was the tenant in possession and had exclusive control over the property because the lessee did not exercise control over the discharging activity. See 1992 Cal. ENV LEXIS at *4-5. Although the lessee had exclusive control of the property, the lessee refrained from exercising any control over the tanks and had deferred control of the tanks to the property owners. See id. Here, similarly, Magma did not exercise control over parties that operated the mines or were involved in mining operations, nor did it exercise control over any other discharging activity.

We understand from communications with Regional Board staff that Magma has been named as a discharger on the ground that its geothermal well drilling activity, in particular the installation of a drilling pad, resulted in disturbance of soil that facilitated the discharge of mining waste into waters of the State. First, the well-established definition of the term "discharge" does not include such "disturbance activities" and we are aware of no authority to support such an unprecedented expansion of the term. Second, Magma's activity did not facilitate the discharge of mining waste into Sulphur Creek and Magma did not permit any other party to discharge waste from the property in which it had a leasehold interest. The two geothermal wells in which Magma was involved were regulated by the DOGGR and closed and abandoned under the approval of the agency more than 40 years ago. The allegation in paragraph 43 of the Draft Order that dischargers "have caused or permitted waste to be discharged or deposited where it has discharged to waters of the state and has created, and continues to threaten to create, a condition of pollution or nuisance" is simply wrong with respect to Magma.

Even if soil disturbance was somehow relevant here (which it is not), Magma's drilling activity did not result in significant disturbance of soil, especially in comparison to the activities of other entities. Based on the size of the drill rigs used at the time W-1 and WHS-1 were drilled, the drill pads for these geothermal wells likely would have been 100 feet by 100 feet in size, and their construction would have had minimal impact. The area and amount of soil in the District disturbed by the road-building operations of CalTrans and the cattle-grazing activities of local ranchers or farmers over decades is far greater

[2] In addition, the Regional Board has not demonstrated that the mercury contamination in Sulphur Creek is primarily the result of anthropogenic activity and not naturally-occurring mercury, nor has it demonstrated that any contamination was caused by activities of Magma and not the activities of other parties, including mining activities upstream from the sites of the geothermal wells in which Magma was involved.

Paul*Hastings*

than any disturbance resulting from Magma's limited activities during a three-year span. Regional Board staff have stated that these entities will not be named as dischargers in this order. Magma should be treated no differently.

IV. Conclusion

As discussed above, Magma did not "discharge" waste within the well-established definition of the term for purposes of Water Code section 13304. That definition does not include "disturbance activities" and we are aware of no authority to support an unprecedented expansion of the term by the Regional Board. Magma had no involvement in mining operations in the District or operating mining sites in the District, Magma has owned no land within the District, and Magma has had no real property interest in the District since 1968. In short, there is no basis to name Magma as a discharger in the Draft Order, let alone "substantial evidence to support a finding of responsibility" as required by law, and the inclusion of Magma as a discharger is based on incorrect factual statements. Magma respectfully requests that the Regional Board remove it as a discharger from the Draft Order and any subsequent version of the order.

Thank you for the opportunity to submit comments on the Draft Order. Please do not hesitate to contact me with any questions.

Very truly yours,

Sanjay Ranchod
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc: Peter H. Weiner
Patrick Pulupa, Staff Counsel, State Water Resources Control Board

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